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No. 18

In the Supreme Court of the United States

OCTOBER TERM, 1932

NORFOLK & WESTERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Summary of argument	6
Argument:	
I. The Commission's order was a valid and reasonable exercise of the power conferred by Section 20 of the Interstate Commerce Act	9
II. Appellant's coal mining property and leaseholds are not devoted to transportation service	15
Conclusion	24
Appendix	25–27

CITATIONS

Cases:

Assigned Car Cases, 274 U. S. 564	20
Bluefield Water Works & Improvement Co. v. *Public Service Commission*, 262 U. S. 679	21
Consolidated Gas Co. v. *City of New York*, 157 Fed. 849	21
Delaware, L. & W. R. R. Co. v. *United States*, 231 U. S. 363	20
Delaware, L. & W. R. R. Co. v. *Yurkonis*, 238 U. S. 439	19
Denver Union Stock Yard Co. v. *United States*, 57 F. (2d) 735	23
Eldridge v. *Smith*, 34 Vt. 484	17
Houston v. *Southwestern Bell Telephone Co.*, 259 U. S. 318	21
Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194	13, 19
Kansas City Southern Railway Co. v. *United States*, 231 U. S. 423	12, 13
Minnesota Rate Cases, 230 U. S. 352	21
Oliver Iron Mining Co. v. *Lord*, 262 U. S. 172	19
Pacific Telephone and Telegraph Co. v. *Whitcomb*, 12 F. (2d) 279, affirmed, 276 U. S. 97	23
Santa Fe, Prescott & Phoenix Railway Co. v. *Grant Brothers Construction Co.*, 228 U. S. 177	16
Spring Valley Waterworks v. *City, etc., of San Francisco*, 192 Fed. 137	21
State v. *Commissioners of Mansfield*, 23 N. J. L. 510	16–17
United Mine Workers of America v. *Coronado Coal Co.*, 259 U. S. 344	19
Virginian Railway Co. v. *United States*, 272 U. S. 658	24

Statute:

Interstate Commerce Act— Page

Section 15a (2), (4) (c. 91, 41 Stat. 488; U. S. C., Title 49, sec. 15a (2), (4)) ---------- 25–26

Section 19a (a), (b), (e) (c. 92, 37 Stat. 701; c. 91, 41 Stat. 493; c. 210, 42 Stat. 624; U. S. C., Title 49, sec. 19a (a), (b), (e)) ---------- 26

Section 20 (5), (6) (c. 3591, 34 Stat. 594; c. 91, 41 Stat. 493, 494; U. S. C., Title 49, sec. 20 (5), (6)) -------- 26–27

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OPINION BELOW

The opinion of the specially constituted District Court (R. 305) is reported in 52 F. (2d) 967. The report of the Interstate Commerce Commission (R. 13) is reported in 171 I. C. C. 557.

JURISDICTION

The final decree of the District Court was entered October 15, 1931. (R. 304.) Petition for ap-

peal was filed November 14, 1931, and was allowed November 18, 1931. (R. 314, 320.) The jurisdiction of this Court rests on the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

I. Whether the order of the Interstate Commerce Commission requiring appellant to classify as nontransportation property its investment in coal mines, the output of which it used for railroad fuel, was a valid and reasonable exercise of the powers conferred upon the Commission by Section 20 of the Interstate Commerce Act.

II. Whether coal mining property and leaseholds acquired and used by appellant for supplying a part of its present and future fuel requirements is property devoted to transportation service.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 25–27.

STATEMENT

This is a suit, instituted by the Norfolk & Western Railway Company against the United States and the Interstate Commerce Commission, to enjoin the enforcement of an order of the Commission dated January 5, 1931 (R. 33), which pre-

scribed the manner in which appellant should set up in its accounts certain investments which it has in coal mines, the production of which is used to supply a part of its fuel needs.

Appellant's mining interests are in three collieries, *viz*, the Howard, the Vulcan, and the Pond Creek. (R. 43.) Its interests in Howard Collieries and the Vulcan Colliery were acquired in 1917, and in the Pond Creek Colliery in 1920. (R. 43.) All of these mines are located in West Virginia. The Howard Collieries are located on a short branch line of appellant connecting with its main line at Chattaroy, West Virginia, and consist of 2,875 acres of land, fee title to which was taken by the Pocahontas Coal & Coke Company, a subsidiary of appellant, appellant itself being entitled to the mining rights, royalties being prepaid. (R. 43, 112.) In addition, so-called leases were made in 1924 and 1925 covering adjacent lands (R. 43), the total acreage being about 5,350 acres. It was estimated at the time of the acquisitions that approximately 30,650,000 tons of recoverable coal were available from the Howard Collieries. (R. 51.)

The Vulcan Colliery is located on appellant's main line at Vulcan, West Virginia, and consists of about nine hundred acres. (R. 43–44.) It was estimated that the aggregate amount of recoverable coal from this source was 4,953,000 tons, including that available from subsequently acquired sources. (R. 51.) The Pond Creek Colliery is located at

Williamson, West Virginia, adjacent to the terminal yards, and includes, with additions, about 2,900 acres. (R. 43, 44.) It was estimated that the recoverable coal from this colliery was 17,500,000 tons. (R. 51.) Appellant owns outright only the coal underlying the original Howard Collieries acquisition, consisting of 2,875 acres, the remaining 6,300 acres being covered by royalty leases, under which the coal does not become the carrier's property until mined and paid for. (R. 18, 112.)

The total tonnage of all these properties was estimated at 53,103,000 tons. On September 30, 1928, 8,476,058 tons had been mined from the three properties, consisting of Howard, 4,645,062; Vulcan, 1,746,779; Pond Creek, 2,084,217. (R. 51–52.) It was estimated that, under normal conditions of production, the supply of coal from the Howard Collieries would not be exhausted until the lapse of thirty-three years (from the year 1928), the estimates as to the Vulcan and Pond Creek collieries being, respectively, seventeen and thirty-five years. (R. 123, 124.)

The entire output of these mines is consumed by appellant in its operations. (R. 48.) Appellant's average yearly fuel requirement is about 3,250,000 tons, and about 48% of its requirements were supplied by these collieries in the first nine months of 1928. (R. 18; Ex. 6, R. 50A.)

Appellant's net capital investment in the three collieries as of September 30, 1928, was $2,650,467.28. (Ex. 4, R. 46A.) The details as to the acquisition

costs of the three collieries are shown in Exs. 50, 51, and 52. (R. 107–109.) The gross capital investment in the Howard Collieries was $1,480,665.31. (Ex. 50, R. 107.) Of this, appellant allocated $900,000 to mining rights, $224,775.15 to mine development, and the balance to mine plant and equipment. (R. 112, 114; Ex. 50, R. 107.) The total investment includes a payment by the carrier of $250,000 made to secure cancellation of a prior lease. (R. 113, 115.) Royalties of 20¢ per ton are paid to the lessee on each ton of coal mined. (R. 113.) No part of the acquisition cost of the Vulcan Colliery was allocated to "Mining Rights" or " Leaseholds." (Ex. 51, R. 108.) An item of $152,670.09 was specified as the acquisition cost of leaseholds in the Pond Creek Colliery. (Ex. 52, R. 109.) The total Pond Creek investment was $329,546.22. (Ex. 4, R. 46A.) Of this amount $300,000 was the cost of acquiring the stock of a corporation previously operating the mines, but the leasehold value was arrived at by deducting from the total acquisition cost the appraised values of the physical properties. (R. 90, 118, 121.)

Since the opening transaction appellant has carried these mining investments in its accounts under "Balance Sheet Account 705," relating to investment in miscellaneous physical property . (R. 18.) On August 3, 1927, it addressed a letter to the Commission's Bureau of Accounts asking that it be permitted to transfer the investment in these col-

lieries from Account 705 to Account 701, "Investment in Road and Equipment." (Def. Ex. 1, R. 296.) The Commission took this request under consideration, and on January 14, 1928, entered an *ex parte* order directing that the investment be continued under Account 705. (R. 14.) Appellant, after notification of this action, filed with the Commission a petition asking for a hearing on the subject, which was granted by a supplemental order of the Commission dated July 24, 1928. (Def. Exs. 3, 5, R. 300, 303.) By this order the Commission suspended its order of January 14, 1928, and assigned the matter for hearing. After a full hearing the Commission issued a report and its final order of January 5, 1931, which is involved in this proceeding.

SUMMARY OF ARGUMENT

I. The Commission's order required appellant to enter its mining investments in its accounts as non-transportation property, to account for the attendant revenues and expenses as arising from miscellaneous operations, and to charge to its railway operating expenses the average monthly production cost per ton of coal produced in the collieries for consumption in appellant's transportation operations. Wholly apart from the technical question whether appellant's mines are used for transportation service, the Commission's order must be sustained as a reasonable exercise of its powers under

Section 20 of the Act. The sole effect of the Commission's order is to require appellant to keep its accounts in the prescribed manner. There is nothing in the order or in the Act which makes the Commission's determination that these mines are not transportation properties final for rate-making purposes.

The Commission's order and pertinent classifications tended to preserve uniformity in carrier accounts generally, which was one of the principal objects sought by Section 20 of the Act. Furthermore, the order did not deprive appellant of an opportunity to earn a return on its investment in the collieries. Appellant may claim as a part of the cost of the coal produced allowances for depletion, depreciation, and carrying charges on the investment. Appellant offers no valid reason for disturbing the noncarrier classification of mining properties consented to by it and other carriers over a period of many years.

II. Analysis of the essential character of appellant's mining operations requires the classification of its investment as nontransportation. The business of mining coal is entirely separate from that of transportation. The mere fact that the mines supply a needed facility does not stamp them as transportation properties. The manufacture of rails, ties, and cars for carrier use provides needed facilities, yet it could hardly be contended that these

are common carrier activities. Such activities naturally invite private enterprise and need not be engaged in by carriers.

The mining properties are not devoted to the public use as are the carrier's lines and usual facilities. Since Section 20 of the Act was designed principally to inform the Commission as to matters within its regulatory power, it is reasonable that properties not devoted to public use and subject to regulation should be separately classified. The business of mining, moreover, is not commerce and can therefore hardly be regarded as constituting transportation.

If the mines are not treated as property but as a supply of consumable coal, as suggested by appellant in the court below, the Commission's order denying a carrier classification is likewise justified. Applicable valuation decisions do not support the inclusion in the rate base of property not used and for which there is no imminent need.

If appellant's mining operations have yielded savings, this is not relevant in the determination of the proper classification of mines. Its estimate as to the amount of savings is excessive. In view of the more reasonable distribution of carrying charges which would result, a noncarrier classification is in the public interest.

ARGUMENT

I

THE COMMISSION'S ORDER WAS A VALID AND REASONABLE EXERCISE OF THE POWER CONFERRED BY SECTION 20 OF THE INTERSTATE COMMERCE ACT

The Commission's order, dated January 5, 1931, required appellant to carry its mining investment in its accounts under Balance Sheet Account 705, entitled "Miscellaneous Physical Property," and further required it to record the revenues received and expenses incurred and taxes paid under the form of accounts relating to miscellaneous operations. (R. 34–35.) The order provided further that the coal produced in the collieries for consumption in appellant's transportation operations should be charged to its railway operating expenses, under account No. 716, entitled "Material and Supplies," upon the basis of the average monthly production cost per ton. Provision was made for the furnishing by appellant of detailed monthly statements showing tonnage of each of the grades, kinds, and sizes of coal produced in each colliery, the cost per ton of each, and the comparable market prices of coal purchased by it from outside sources during the same period. Appellant contends that the order of the Commission was unlawful and had the effect of excluding from its rate base, upon which rates might be fixed or recapture determined, property devoted to transportation service. It was not alleged in the petition that the uniform accounts prescribed by the

Commission were unlawful, although the order was based upon an accounting classification prescribed by the Commission in an order of May 19, 1914 (R. 310), which classified coal mines as miscellaneous physical property.[1]

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[1] The pertinent provisions relating to the classification of properties are:

1. *Accounts for Investment in Road and Equipment.*—The accounts prescribed in this classification are designed to show the investment of the carrier in property devoted to transportation service. The carrier's investment in physical property other than transportation property is provided for in balance-sheet account No. 705, "Miscellaneous physical property." *The carrier* means the accounting carrier, except when otherwise specifically indicated. * * *. ("Classification of Investment in Road and Equipment of Steam Roads," July 1, 1914, "General Instructions," p. 9.) (See R. 20.)

701. *Investment in Road and Equipment.*—This account shall include the accounting company's investment in road and equipment (including that held under contract for purchase) in existence at the date of the balance sheet. * * *. (R. 19.) (See "Classification of Income, Profit and Loss, and General Balance Sheet Accounts," July 1, 1914, p. 43.)

705. *Miscellaneous Physical Property.*—This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts Nos. 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

Items of Investment: Coal and other mines, Commercial power plants, Hotels and restaurants, Lands and buildings not used in transportation operations, Lands and other property acquired and held in anticipation of future use, Mineral and timber lands, Rails and other track materials leased to others, Sawmills and other manufacturing plants not operated in connection with transportation service. (R. 279.) (See *ibid*, p. 44.)

The Commission's power to enter the order rests on Section 20 of the Interstate Commerce Act. Section 20 (5) of that Act provides that the Commission may prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of the Act, including those relating to the movement of traffic and to the receipts and expenditures of money. (*Infra,* pp. 26–27.) Section 20 (6) provides penalties for failure to keep such accounts, etc., in the manner prescribed by the Commission. (*Infra,* p. 27.) Appellant suggests that the validity of the order must be considered also in relation to the provisions of Sections 15a and 19a of the Act. Section 15a (2) authorizes the Commission to initiate, establish, or adjust rates so that carriers as a whole will earn, as nearly as may be, an aggregate annual net railway operating income equal to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. (*Infra,* p. 25.) Other paragraphs of that section provide for the recapture of funds earned by carriers in excess of a fair return. Section 19 a (a) provides that the Commission shall ascertain and report the value of all the property owned or used by every common carrier subject to the Act, shall list the properties subject thereto and show their values in the manner provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed

by the Commission. (*Infra,* p. 26.) Provision is made for the determination of the original cost and reproduction cost of property owned or used by the carrier for its purposes as a common carrier.

It is apparent that the sole effect of the Commission's order here is to require appellant to keep its books of account in accordance with the provisions of the order. There is nothing in the Commission's order, or in the Interstate Commerce Act, which makes the Commission's accounting determination that the mines are not transportation properties final for rate-making purposes. Appellant is left free in any rate or recapture proceeding to contend that the mining properties should be included in the rate base. Nor is it clear, as appellant claims, that the necessary effect of classifying the mines as noncarrier properties would be to exclude them from consideration as capital in the issuance of securities. (App. Br., pp. 7, 48.) Even though under the Commission's view securities could probably not be issued for the purpose of acquiring coal mining properties, it would seem that under Section 20a (2) such interest as appellant has in the mines could be used as collateral for a security issued thereunder. The question, therefore, is whether the Commission's order is so entirely at variance with the fundamental principles of correct accounting as intrinsically to manifest an abuse of power. *Kansas City Southern Railway Company* v. *United States,* 231 U. S. 423, 444.

The standardization of the book entries of carriers subject to the Act was one of the principal objects sought to be realized by Section 20. *Kansas City Southern Railway Company* v. *United States*, 231 U. S. 423, 441. Unless the accounts of the carriers speak a common language the Commission is deterred in the performance of its regulative duties over the carriers as a whole. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211, 212. There was evidence before the Commission that the inclusion of the value of mining properties generally under the heading of "Investment in Road and Equipment" would be destructive of uniformity, and that, with respect to this case, such a course would not permit precise comparison between appellant and other railroads of the country. (R. 147, 178, 232.) There was also evidence that the business of mining coal was seldom engaged in by carriers and that accounts suitable for the administration of railway service were not applicable to mining operations. (R. 147, 217.) Under these circumstances it would seem that the Commission's action was amply within its statutory powers, particularly in view of the provisions of the order permitting appellant to charge periodically to its operating expenses, the cost of coal produced and used in its operations. The effect of the order, moreover, was not to deprive appellant of an opportunity to earn a return on its investment in the collieries. Not only is the classification not binding

for rate purposes, but there is nothing in the portion of the order permitting a charge to operating expenses on the basis of the cost of coal consumed which precludes the charge of carrying costs on the investment.[2] The lower court, in its opinion, indicated that it did not regard the order as confining appellant to the mere cost of mining the coal, without allowance for depletion, depreciation, carrying charges, etc. (R. 313.) In its *ex parte* order of January 14, 1928, the Commission permitted such allowances (R. 14), and in its report of January 5, 1931, stated that it would reopen this proceeding whenever necessary in order to further consider and regulate the accounting under which the costs per ton were ascertained (R. 33). The principal witness for the Commission, although taking the view that the mining properties should be classified as noncarrier, recommended the inclusion of these various items in the carrier's operating expenses. (R. 219.)

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[2]Appellant contends (brief, p. 14) that the Commission's order required that the coal produced by appellant in its mines and used by it should be entered in its expense accounts at bare cost. As stated above, we do not believe the order has this effect. The order provides that the monthly charges for coal produced in the mines and consumed by appellant shall be "on the basis of the average monthly cost per ton for producing said coal," which would seem to include carrying costs and current charges for depletion and depreciation. (R. 34.) In any event, the amount of these charges was to be fixed by subsequent action of the Commission. (R. 34.)

Without reference to the technical considerations which relate to the question whether these mines are used for carrier purposes, the Commission's order is fair to appellant and is reasonably related to the purposes designed to be effected by Section 20. The classification indirectly challenged has been in effect since 1914 and is rested upon the customs and practices of the carriers, whose representatives participated in its formulation. (R. 138.) Appellant itself conformed to the general practice, apparently without objection, until 1927. (R. 18; Def. Ex. 1, R. 296.)

II

APPELLANT'S COAL MINING PROPERTY AND LEASEHOLDS ARE NOT DEVOTED TO TRANSPORTATION SERVICE

The Commission's action in requiring the classification of the mining properties as nontransportation properties was also reasonable when considered in the light of the essential character of mining operations. The business of coal mining is entirely separate and distinct from that of transportation, the one involving extraction, the other carriage for hire. The distinction between the two is not destroyed by the fact that the output of the mine is used to supply appellant's fuel requirements. It is but the product that is used in carrier operations, appellant's investment being devoted to an undertaking separate from that of carriage. There are numerous activities in which a carrier may engage

which are not common carrier functions, even though they may result in the supply of needed facilities. The production of steel for rails, the making of ties, the manufacture of cars all provide facilities for carrier use, yet it would hardly be contended that these are common carrier activities or that property employed therein is devoted to transportation service. It has been held that a railroad company is not acting as a common carrier in constructing, improving or repairing its road or in building needed extensions and branches. *Santa Fe, Prescott & Phoenix Railway Company* v. *Grant Brothers Construction Company*, 228 U. S. 177, 186. In that case it was also held that the transportation of supplies and of employees of the contractor was not a common carrier engagement.

The subsequent consumption of coal extracted from these mines by appellant's trains and locomotives is a connection too remote to require the classification of the mines as carrier properties. In *State* v. *Commissioners of Mansfield*, 23 N. J. L. 510, there was involved the question whether dwelling houses owned by a railroad were exempt from taxation under a clause in its charter. The court held that these properties were not necessary appendages of a railroad company and were not within the exempted class. The court said (p. 514):

> The necessary appendages of a railroad and transportation company are one thing, and those appendages which may be convenient

means of increasing the advantages and profits of the company are another thing. It might be advantageous for the company to purchase land, and to erect houses in the right location and of the right kind for all their constant employees, to establish factories for making their own rails, engines, and cars, even to purchase coal mines and supply themselves with fuel; but these are not among the *necessary* powers of such a company.

In *Eldridge* v. *Smith,* 34 Vt. 484, the question was presented whether a factory for manufacturing railroad cars was a part of the appurtenances of the road so as to be included in a mortgage on the carrier properties. The court there held that the business of manufacturing cars and engines was a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and could not be considered as a part of the transportation property.

The business of coal mining is one in which a carrier need not of necessity engage, ample supplies being obtainable from private sources. The public interest is not served by the classification of such facilities as transportation properties with the consequent encouragement of investments therein by carriers. Facilities such as water stations, pump houses, etc., are necessary to carrier operations and do not encourage private investment, and have accordingly been classified as transportation properties. The classification of car

manufacturing plants, lumber mills, steel mills, and oil and mining properties as noncarrier properties is, *per contra,* justified.

Property employed in transportation is dedicated to the public use and the public may regulate the rate to be exacted in the operation of such property. Rate making and the recapture of excess net railway operating income are therefore based upon the value of this property. Property employed in the subsidiary business of mining coal is not dedicated to the use of the public and the public has no right to regulate the rate to be exacted in the operation of such property. Upon the question whether appellant's coal mining property was dedicated to the use of the public, the court below said (R. 312):

> Coal mines, even though owned and operated by a carrier, are clearly not dedicated to the use of the public. See *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522. Although the coal produced by operation of the mines may be said to be used by the public, the mines themselves are not so used. What is used, and all that is used, in the public business of transportation is the coal which prior to its use has been made available by the independent business of mining. The mines of a carrier, therefore, are not dedicated to a public use any more than are mines owned by a private corporation which supplies coal to a carrier under contract. They stand upon the same

> basis with respect to the public service as do plants for manufacturing cars or locomotives. A railroad may not abandon service on its railroad lines and may not lease or sell them without the consent of the Commission because of the rights of the public therein; but no one would contend that the carrier here might not at its pleasure discontinue the operation of its coal mines or lease or sell them as it might see fit.

It is important that the accounts kept by carriers should separately show the financial operations of the carriers with respect to matters within the scope of the Commission's regulatory powers. Section 20 of the Act was upheld against the claim of invalidity upon the ground that its requirement of complete disclosure in a manner prescribed by the Commission was necessary to the exercise of the Commission's regulatory powers. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211.

The business of mining coal is not commerce even though the coal when mined is to be used or transported in commerce. *Delaware, L. & W. R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *United Mine Workers of America* v. *Coronado Coal Company*, 259 U. S. 344, 407; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 178. It follows that coal mining also is not transportation.

That the ownership of coal mines by a carrier is distinct and separate from the transportation serv-

ice which it performs is apparent from the fact that the law does not permit such ownership to interfere with the carrier's obligation to furnish equal transportation service to all alike. (*Delaware, L. & W. R. R. Co.* v. *United States*, 231 U. S. 363, 370; *Assigned Car Cases*, 274 U. S. 564.)

Appellant urged before the lower court that if the property is not regarded as used in the transportation service the mines should be treated as a supply of consumable coal and thus classified as property used in transportation. It is submitted that the Commission has adopted a reasonable method of dealing with the subject upon this theory, since it has permitted appellant to charge to operating expenses the cost of coal as mined, presumably including depletion, carrying charges, etc. In effect the claim for carrier classification on this ground rests upon the hypothesis that it is reasonable to have on hand consumable materials calculated to last for thirty-five years. There was evidence that the normal and reasonable coal requirements for a carrier would not be in excess of a few weeks' supply and that appellant has held only a relatively small supply in storage. (R. 23, 130.) The Commission's practice in valuation cases with respect to material and supply items was to exclude them if unused unless the carrier had reduced them to usable form and transferred them to the material and supplies account. (R. 23.) Manifestly coal yet to be mined can not be regarded as a usable supply, but only as a reserve supply.

Appellant would not under the applicable valuation principles be entitled to have included in its rate base a fuel supply sufficient to last for thirty-five years. Only the value of that property which is used in the performance of the public service can be taken as the basis for fixing rates. *Houston* v. *Southwestern Bell Telephone Company*, 259 U. S. 318, 324; *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 690; *Minnesota Rate Cases*, 230 U. S. 352, 434. It could hardly be contended by appellant that there is an imminent need for a thirty-five years' supply of fuel, and it would therefore be proper to exclude it from consideration as a basis for fixing rates, even if that were the nature of this proceeding. *Spring Valley Waterworks* v. *City, etc., of San Francisco*, 192 Fed. 137, 156 (C. C., N. D. Cal.); *Consolidated Gas Co.* v. *City of New York*, 157 Fed. 849 (C. C., S. D. N. Y.). Since appellant recommended that the entire investment should fall into one classification, it is not necessary to speculate as to the quantity of coal, use for which might be regarded as imminent. (R. 176.)

Appellant seems to have abandoned the claim made in the court below for carrier classification which rested upon the assertion that its investment in the coal mines had proved advantageous, savings of $2,631,445 having been estimated (Ex. 5; R. 48A.) It was shown that in arriving at this estimate no consideration was given to the carrying charges on the investment, which, if taken at 6%,

indicate a savings of but $861,712 over the price of purchased coal. (Ex. 74, R. 240A.) Obviously a part of the price paid by appellant for outside coal is due to such indirect costs. While the matter of economic advantage or disadvantage of owning mines does not bear upon their essential character, subsequent events have shown the inadvisability of carriers' engaging in such outside ventures. Appellant asserts (brief, pp. 39–41) that good management justified investment in these mines at the time of their purchase. Savings were undoubtedly realized during the early years of the operation of these mines when prices were rising and there was a shortage of coal cars. From 1925 to 1928 no saving over the cost of purchased coal was shown. (Ex. 74, R. 240A.) One of appellant's witnesses testified that at the time of the hearing coal could be purchased under spot contracts for less than the cost of mining and that the collieries could probably then be purchased for less than the prices paid for them. (R. 131.) If interest at 6% on appellant's investment in its coal mines is included in the cost of mining coal, in 1925, 1926, 1927, and the first nine months of 1928, its own coal cost it more than its purchased coal. (Ex. 74, R. 240A.) Appellant does not intend to increase the productivity of its mines. (R. 123.) These conditions have undoubtedly been accentuated by the subsequent fall in commodity prices, of which the Court may take judicial notice.

The facts of this case illustrate the advisability of a policy which requires carriers to make ventures into the facility and supply field at their own risk. This will not be so if such investments are classified as employed in the public service. The Commission's order protects the public interest by making the carrier assume the risk of the investment. The order also prevents appellant from saddling upon present shippers the cost of carrying the unused portions of its mines. (Ex. 54, R. 151; R. 167–168.)

Appellant contends (brief, pp. 42–47) that for the Commission to classify these investments as noncarrier would be to substitute its judgment for that of appellant in a matter of internal management. *Pacific Telephone and Telegraph Co.* v. *Whitcomb,* 12 F. (2d) 279, 288, affirmed, 276 U. S. 97, and *Denver Union Stock Yard Co.* v. *United States,* 57 F. (2d) 735, are cited as holding that regulation does not permit interference with the power of management. In the former case the telephone company had invested in apparatus beyond its then existing needs and in the latter case the stockyards company had acquired adjacent real estate for future needs. In each case the investment was in property of the kind required for the performance of the service rendered by the company. But coal mines are not necessary for furnishing transportation by railroad, as demonstrated by the fact that but few railroads own coal mines (*supra,* p. 13).

The Commission's determination that these mines are not property devoted to transportation service is a determination of fact by a tribunal "informed by experience" and is entitled to great weight. *Virginian Railway Co.* v. *United States,* 272 U. S. 658, 665–666.

There is now pending before the Commission appellant's protest and objections to a recapture report and order of the Commission in which the question here presented is involved. (R. 308.)

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
WILLIAM G. DAVIS,
ELMER B. COLLINS,
Special Assistants to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.
NELSON THOMAS,
Attorney,
Interstate Commerce Commission.

OCTOBER, 1932.

APPENDIX

Section 15a of the Interstate Commerce Act provides in part as follows:

> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.
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> (4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. * * * Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value. (C. 91,

41 Stat. 488, U. S. C., Title 49, sec. 15a (2), (4).)

Section 19a of the Interstate Commerce Act provides in part as follows:

> (a) That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. * * *
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> (b) First. In such investigation said commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.
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> (e) * * * all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. * * * (C. 92, 37 Stat. 701; c. 91, 41 Stat. 493; c. 210, 42 Stat. 624; U. S. C., Title 49, sec. 19a (a), (b), (e).)

Section 20 of the Interstate Commerce Act provides in part as follows:

> (5) The Commission may, in its discretion, prescribe the forms of any and all

accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. * * * The Commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, * * *.

(6) In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act. (C. 3591, 34 Stat. 594; c. 91, 41 Stat. 493, 494; U. S. C., Title 49, sec. 20 (5), (6).)

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